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No. 02-359

In The

# Supreme Court of the United States

AUBREY E. HENRY,

*Petitioner,*

v.

JEFFERSON COUNTY PLANNING COMMISSION, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether this Court should accept an appeal of a local zoning decision unsuccessfully challenged by the landowner on substantive due process grounds where the sole issue presented for review is whether the landowner possessed a protectable property interest, and where the district court held that even if the landowner *did* have a protectable property interest, his substantive due process rights were not violated because the decision was not arbitrary and capricious?

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## STATEMENT OF THE CASE AND FACTS

The Jefferson County Planning and Zoning Commission denied, by unanimous vote, Aubrey Henry's application for a conditional use permit to build a 76-unit townhouse development on 9.8 acres of land in Jefferson County, West Virginia. Henry sued the Commission and others, asserting that the local zoning ordinance was unconstitutionally vague on its face and that the denial of the permit to build the townhouse project amounted to an unconstitutional taking of his property without just compensation and violated his due process and equal protection rights. The District Court granted summary judgment to the defendants on the vagueness challenge to the zoning ordinance and dismissed Henry's other claims on the grounds of *Burford* abstention. In reviewing that decision in an earlier appeal, the Court of Appeals affirmed the ruling that the ordinance was not unconstitutionally vague, vacated the dismissal of the remaining claims, and remanded for further proceedings. The District Court then granted summary judgment to the defendants on the remaining claims, and Henry appealed for a second time. On the second appeal, Henry abandoned his equal protection claim, leaving only the takings claim and the substantive due process claims for the Court of Appeals' review. The Court of Appeals affirmed the District Court's grant of judgment to the defendants on the substantive due process claim and vacated the judgment on the takings claim, finding that the latter claim was not ripe for review. The sole issue Henry now presents for this Court's review is the judgment in favor of the defendants on the substantive due process claim.

Aubrey Henry is part owner of a 13.69-acre tract of land located in Jefferson County, West Virginia. Henry

owned and operated a restaurant on this property beginning in 1979, when he took over the restaurant from his parents. In 1988, Jefferson County enacted a new Zoning Development and Review Ordinance which zoned the property as a Rural-Agricultural District. This district is for low-density, single family residential development in conjunction with farming activities. Although Henry's restaurant was a non-conforming use under the new ordinance, he was permitted to continue operating the restaurant under a grandfather clause. In 1993, the restaurant burned to the ground. Henry discussed rebuilding the restaurant with Paul Raco, the Director of the Jefferson County Planning and Zoning Commission. According to Henry, Raco told him that he should not bother applying for a permit to rebuild the restaurant because he would not be able to satisfy a number of necessary conditions. Instead, Raco allegedly told Henry to submit an alternative plan to build townhouses. If this was approved, then supposedly it would be easier for Henry to get approval at a later time to rebuild his restaurant.

Allegedly in reliance on this advice, Henry in early 1994 sought a conditional use permit for a 76-unit townhouse project on 9.8 acres of the property. Because the land had reverted to agricultural use after the restaurant burned down, Henry's proposed use was not allowed as of right. Henry properly sought a conditional use permit under Jefferson County's Development Review System. After processing Henry's proposal according to this system, the Commission unanimously voted to deny the permit. The denial was based on the project's high housing unit density (which was much greater than the density in the surrounding area), its effect on the adjacent park, and its general incompatibility with the neighborhood.

In his Statement of the Case, Henry has made several inaccurate statements regarding his application for a conditional use permit. First, Henry states that "[i]n the Rural-Agricultural District, townhouses are allowed, after obtaining a conditional use permit, based upon an objective point scoring system, known as the Development Review System ('system')." (Pet. 3-4). This statement oversimplifies the requirements for obtaining a conditional use permit. As the District Court's decision in this case explains,

> [t]he Ordinance sets forth five steps in reviewing an application for a conditional use permit: (1) the Planning and Zoning Staff evaluation of the Development Review System; (2) the Compatibility Assessment Meeting; (3) Public Hearings; (4) Planning and Zoning Commission's decision on the application; and (5) the Board of Zoning Appeals' decision.

*Henry v. Jefferson County Planning Comm'n*, 148 F. Supp. 2d 698, 699 (N.D. W.Va. 2001).

Next, Henry states that a crowd of 80 people showed up at the public meeting "to protest the granting of the permit because low income people would live there and use the public park next to the project." (Pet. 4) However, the record reflects that the concerns voiced at the meeting addressed a host of concerns, including management of storm water drainage, the ability of the local waterways to handle the increase in sewage effluent, the possible adverse effects of the project on the cultural and historic character of the area, the increase in automobile traffic, and the effect the increase in population would have on local schools. *See Henry*, 148 F. Supp. 2d 698 at 701. Henry's representation that 80 people turned out to

protest the creation of low income housing in their area is misleading.

Henry also states that "[t]he Commission had already saddled the project with conditions designed to keep these 'lower income' families out of, and from using the publicly-operated park next door." (Pet. 4) However, the Commission did not "saddle" the project with any conditions at all–it denied, without conditions, the issuance of a permit. *Henry,* 148 F. Supp. 2d at 701-702. The concerns raised at the public hearing were not "conditions" imposed upon Henry's project. They were compatibility factors considered by the Commission in deciding whether or not to approve the project, deny it, or approve it with conditions. Therefore, Henry's contention that the Commission imposed conditions on his project is incorrect.

Henry next claims that "[t]he protesting crowd was out-of-control, and shouted [him] down . . . whenever he tried to speak in his defense." (Pet. 4) Thus, Henry leads this Court to believe that he was not afforded a fair opportunity to speak in defense of his proposal. What he fails to mention is that at three public hearings (held on April 26, 1994, May 24, 1994, and August 18, 1994), Henry failed to provide any evidence in support of his project that would address the concerns raised by the public. Henry had nearly five months from the initial hearing to gather material or information to contradict the allegations of incompatibility made by the public. If he truly feared for his life, as he suggests (Pet. 4), he had ample opportunity to hire legal counsel to make his case for him. Instead, he chose to squander those three opportunities, and his permit application was denied.

Henry also claims that "the Commission denied the permit referring to the danger the project would create for the neighboring publicly-operated park." (Pet. 5) This is an incomplete statement. The record shows that the stated reasons for the denial were "the project[']s density; its effects on the Town Run Marsh and Morgan Grove Park; and, its incompatibility with the neighborhood." *Henry*, 148 F. Supp. 2d at 702. To the extent Henry's Statement of the Case suggests otherwise, it is incorrect.

Pursuant to state law procedure, Henry appealed the Commission's decision to the Jefferson County Board of Zoning Appeals. The Board affirmed the Commission's findings and decision. Henry then challenged the Board's decision through the West Virginia state court system. He sought certiorari in state circuit court, which affirmed the Commission's decision. Henry then sought review in the Supreme Court of Appeals of West Virginia, which remanded the case to the Board with instructions that the Board support its decision with more thorough fact-finding. The Board gave Henry the opportunity to present more evidence, but Henry requested instead that the Board expedite the decision without another hearing. The Board then issued a six-page decision affirming the denial. The Board concluded that the Zoning Commission had properly followed the public hearing procedures set out in the ordinance. It also concluded that the proposed development, with a density of 7.75 housing units per acre, was incompatible with the relative density of the surrounding area, which consisted mainly of one single family home per two acres or more of land. The Board found the proposed development incompatible with the purpose of the Rural-Agricultural District. Henry again sought certiorari in the circuit court, which affirmed the Board's decision. The

Supreme Court of Appeals of West Virginia denied review, and although a direct appeal to this Court was possible, no appeal was taken. Throughout this state review process, Henry challenged the legal and factual sufficiency of the Commission's decision. At no time during this process did Henry seek compensation for the denial of his permit. *See, e.g., Henry v. Jefferson County Planning Comm'n,* 201 W.Va. 289 (1997).

Henry also brought suit in federal district court, challenging the constitutionality of the ordinance, alleging an unconstitutional taking of his property, and claiming due process and equal protection violations. As noted above, the Court of Appeals affirmed the District Court's ruling that the ordinance was not unconstitutionally vague in a prior appeal, but it remanded Henry's remaining claims for further proceedings. On remand, the District Court granted summary judgment to the defendants on these claims. In finding that Henry's substantive due process rights were not violated, the District Court held that (1) Henry had "at best, a unilateral expectation and not a protected property interest"; and (2) that "even if Henry could establish a protectable property interest . . . he [could not] establish that the defendants[']actions were so far beyond the outer limits of legitimate state action that no [process] could cure the defendants' actions." *Henry*, 148 F. Supp. 2d at 714. Henry appealed the District Court's ruling on his takings and substantive due process claims, but he did not appeal the ruling on the equal protection claim. The Court of Appeals affirmed the District Court's grant of judgment to the defendants on the substantive due process claim and vacated the judgment on the takings claim, ordering that the claim be remanded for the purpose of dismissal because the claim was unripe.

Henry now petitions this Court for a review of a single aspect of the substantive due process decision: whether as part of his substantive due process claim he is required to show a legitimate claim of entitlement to the conditional use permit he seeks. (Pet. i)

## REASONS FOR DENYING THE WRIT

### I. THE QUESTION RAISED BY THE PETITIONER IS NOT PROPERLY BEFORE THIS COURT.

Henry's Petition for Certiorari should be denied because he has not previously raised the issue he attempts to raise in this appeal. The sole issue presented to this Court for review is whether a landowner seeking a discretionary zoning permit must show a property interest in the permit itself in order to make out a substantive due process claim against the government. (Pet. i) The Petitioner argues that a split of authority among the various courts of appeals has emerged, and that instead of relying on its own precedent in *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992), the Fourth Circuit Court of Appeals should instead have relied on the Third Circuit's decision in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995). However, none of Henry's prior briefs before the lower courts ever mentioned this split of authority or advocated the position stated in *DeBlasio*. Henry did not cite *DeBlasio* in his brief before the Court of Appeals, nor did he advance the theory that ownership of the property, by itself, is a sufficient "property interest" to trigger

substantive due process protection in a zoning permit case.[1]

In fact, the argument Henry advances in his Petition was raised only by *amicus curiae* the Pacific Legal Foundation before the Court of Appeals. This Court has stated in the past that "it is our practice 'to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.' *Bragdon v. Abbott,* 524 U.S. 624, 638, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998)." *Owasso Independent School District No. I-011 v. Falvo,* 534 U.S. 426, 431, 122 S. Ct. 934, 938, 151 L. Ed. 2d 896, 903 (2002). Henry may argue that the issue was properly raised at least before the Court of Appeals because the Pacific Legal Foundation raised the issue in its *amicus curiae* brief. However, the Court of Appeals has noted that "[a]n appellant and an amicus may not split up the issues and expect the court to consider that they have all been raised on appeal." *United States v. Buculei*, 262 F.3d 322, 333 n.11 (2001); *see also id.* at 333 n.11 ("An issue waived by appellant cannot be raised by amicus curiae.") (internal citations omitted). This Court has also held that arguments raised by *amici curiae* that are not raised by the parties should not be considered. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n.2, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (1981) (noting that the Court does not decide issues raised by *amici* that were not decided by the court of appeals or argued by the interested party); *Bell v.*

[1] Henry argued before the Court of Appeals that he had a property interest in the permit, and in a footnote, he argued alternatively that he was not required to show a property interest at all.

*Wolfish*, 441 U.S. 520, 531, n.13, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (same). Therefore, the raising of the issue by the *amicus curiae* in this case and in the Court of Appeals did not properly preserve the issue for appeal, and the writ should be denied.

## II. THE ISSUE RAISED IN THE PETITION HAS NOT BEEN RAISED IN *CITY OF CUYAHOGA FALLS v. BUCKEYE COMMUNITY HOPE FOUNDATION.*

Henry has argued as a reason for granting the writ in this case that "[t]he Court recently granted certiorari on essentially the same due process issue as the one involved here in the case of *City of Cuyahoga Falls, OH et al. v. Buckeye Community Hope Foundation,* No. 01-1269, on June 24, 2002 ("*Buckeye* case")." (Pet. 6) However, the issue raised by Henry's Petition is not raised in the *Buckeye* case.

As mentioned above, the Petition herein seeks to resolve a split among the circuit courts of appeals on the issue of whether a landowner challenging a denial of a discretionary zoning permit on substantive due process grounds must prove a property interest in the permit itself rather than ownership of the affected land. According to the Petition, both the Court of Appeals for the Sixth Circuit (where the *Buckeye* case originated) and the Court of Appeals for the Fourth Circuit (where this case originated) apply the *Roth* entitlement analysis[2] to substantive

[2] *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an

(Continued on following page)

due process challenges of zoning decisions and require the landowner to prove a property interest in the permit denied to him. *Compare Triomphe Investors v. City of Northwood,* 49 F.3d 198, 202-04 (6th Cir. 1995) *with Gardner,* 969 F.2d 63, 68-69 (4th Cir. 1992). A review of the Petition for Writ of Certiorari and Brief in Opposition in *Buckeye* shows that neither party in that case asks this Court to examine the propriety of applying *Roth* in this manner in zoning cases involving substantive due process challenges. The appellant in *Buckeye* argues that no property interest exists in the land use permits under *Roth* and *Gardner*, while the Appellee argues that a property interest does exist under *Roth* and that *Gardner* is distinguishable. Henry's attempt to equate his case with one the Court has agreed to hear in *Buckeye* should therefore be rejected. The fact that the Pacific Legal Foundation has filed *amicus curiae* briefs advocating the same position in both cases does not make the two cases alike.[3]

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abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

[3] It appears from the briefs filed in this Court thus far in *Buckeye* that unlike Henry, none of the parties in *Buckeye* is interested in taking up the Pacific Legal Foundation's cause.

## III. THIS CASE IS A PARTICULARLY POOR CASE IN WHICH TO RESOLVE A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS.

If this Court were inclined to resolve the split of authority among the circuit courts of appeals on the property interest issue,[4] this case would serve as a particularly poor vehicle, even when considered in conjunction with *Buckeye*. First, as mentioned above, the Courts of Appeals for the Fourth and Sixth Circuits are on the same side of the split. *Compare Triomphe*, *supra* with *Gardner*, *supra*.

Second, the dismissal of the substantive due process claim was not based solely on the absence of a property interest in the conditional use permit Henry sought. The District Court held that even if Henry *did* have a protectable property interest, his substantive due process claim should nevertheless be dismissed because the defendants' actions were not so far outside the legitimate bounds of state action that no process could cure the defendants' actions. *Henry,* 148 F. Supp. 2d at 714. Thus, even if this Court granted the writ and adopted the minority position advocated by the Petitioner, the judgment should still be affirmed because the decision to deny the permit was not

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[4] The Court had a prime opportunity to decide the split when it matured in 1995, but it declined. *Compare DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 596-601 (3d Cir.) (establishing substantive due process protection for landowner's property without necessity of demonstrating property interest in zoning permit), cert. denied, 116 S. Ct. 352 (1995) *with Triomphe Investors v. City of Northwood,* 49 F.3d 198, 202-04 (6th Cir.) (applying "legitimate claim of entitlement" test to deny protection to landowner), cert. denied, 116 S. Ct. 70 (1995).

arbitrary and capricious. The fact that the issue raised in Henry's Petition may be of nationwide importance (*see* Pet. 17) is irrelevant because the outcome of the case does not depend on the answer to the question presented. Petitioner's invitation to consider a non-dispositive, albeit interesting, constitutional issue solely because other landowners in future cases might benefit from the creation of a new general rule must be declined. As this Court explained in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926):

> In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

*Euclid*, 272 U.S. 365, 397.

## IV. THE LOWER COURTS APPLIED THE APPROPRIATE LEGAL STANDARD AND CORRECTLY HELD THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Finally, the Court should decline the Petition because the courts below applied the correct standard and reached

the correct conclusion. The minority position stated in *DeBlasio* has little to recommend it. To allow any landowner aggrieved by a decision of a local zoning authority to challenge the decision as an "arbitrary and capricious" violation of his right to due process would convert the federal courts to boards of zoning appeals.[5] This approach is inherently incompatible with judicial restraint. It allows courts to substitute their own judgment for the zoning authorities and states. It is axiomatic that not every violation of a state or local statute or ordinance amounts to an infringement of constitutional rights. *Paul v. Davis*, 424 U.S. 693, 700 (1976). Without judicial restraint, it is easy to turn any injury to persons or property by a government official into a due process claim. For this reason, the federal judiciary has been justifiably reluctant to extend due process protection to interests that are more properly protected in state courts construing state law. *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). A due process claim requires more than an allegation that "the government decision was arbitrary, capricious, or in violation of state law. . . . Otherwise, every violation of state law could be turned into a federal constitutional tort." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). The practical effect of allowing any landowner to challenge the application of a zoning ordinance to his property by a substantive due process challenge would be to convert what should be purely state court issues into

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[5] *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (stating that, had Boraas merely claimed violations of his property interests, without an equal protection claim, an arbitrary zoning ordinance would have been upheld because "our role is not and should not be to sit as a zoning board of appeals").

federal constitutional controversies. *See Gardner*, 969 F.2d 63, 68 ("federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. [42 U.S.C.] Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every run of the mill dispute between a developer and a town planning agency.") (internal quotations omitted).

The *DeBlasio* standard is also wrong because it improperly focuses the property interest analysis on the ownership of the property itself rather than the particular use that is being restricted. The Fourteenth Amendment prohibits the government from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Therefore, in a due process challenge, the focus should be on the particular property interest of which the landowner is being deprived.

In the present case, the government is not attempting to deprive Henry of ownership of his land.[6] Therefore, his ownership interest in the land itself is not sufficient to trigger substantive due process protection. Henry is not being deprived of ownership of his property; instead, he is being denied one particular use of that property. The focus of the property interest inquiry, then, is properly on the particular use being deprived – the right to build 76 townhouses in a low-density zone. Unless he can demonstrate entitlement to that use, the deprivation of that use

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[6] If the government *were* to deprive Henry of his ownership in land, his remedy would be through the Fifth Amendment, not the Fourteenth Amendment.

does not offend the Fourteenth Amendment. Therefore, it is proper to require him to demonstrate a property interest in the permit he seeks, which would authorize an otherwise unauthorized use. The majority of the circuit courts of appeals applying the *Roth* entitlement test to cases involving zoning and building permits is therefore correct.

Ownership of property does not entitle the landowner to use the property in any manner he chooses. The property interests protected by the Due Process Clause are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. 564, 577. *Roth* is applicable in a case such as this because what the landowner is seeking is the right to develop property in a manner inconsistent with a facially valid zoning ordinance.[7] A landowner's use of his property affects not only his property, but the surrounding properties as well. The neighboring landowners have the right to enforcement of the zoning ordinance, which is intended to preserve the character of the area. The right to own property may be a fundamental right, but the right to each and every *use* of the property is not because the reasonable limitations imposed by nuisance law and valid statutory exercises of the police power are inherent in the ownership. Making an exception to allow a use that is otherwise prohibited by a

[7] Henry's facial challenge to the constitutionality of the applicable zoning ordinance was found to be without merit by the Court of Appeals. *Henry v. Jefferson County Planning Comm'n*, No. 99-2122, 2000 U.S. App. LEXIS 12844 (4th Cir. June 9, 2000).

facially valid zoning ordinance is properly analyzed under *Roth* as it involves the discretionary expansion of development in a manner which impairs the rights of adjacent landowners.

In addition, the *DeBlasio* standard would allow landowners to bypass the federal ripeness requirement for regulatory takings set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) by recharacterizing their regulatory takings claims as substantive due process claims. In this case, for instance, the Court of Appeals remanded Henry's regulatory takings claim with orders to dismiss, finding that "Henry's takings claim is not ripe because he has not sought just compensation from the State of West Virginia and been denied it." *Henry v. Jefferson County Planning Commission*, No. 01-1948, 34 Fed. Appx. 92, 98, 2002 U.S. App. LEXIS 8803 at *13 (4th Cir. 2002). The ripeness requirement ensures that state courts have the opportunity to review and, if needed, to provide a remedy for the effects of the land use decision. The Fifth Amendment (complete with its ripeness requirement), not the Fourteenth Amendment, is the proper basis for challenging a regulatory taking of property. Adoption of the *DeBlasio* standard would render the ripeness prerequisites meaningless. The requirement that the landowner show a property interest in the permit he seeks prevents the landowner from circumventing the state court ripening process, and helps ensure that land use decisions stay where they belong – in the state courts. The adoption of the *DeBlasio* standard would federalize an entire area of law in which the state courts provide adequate remedies.

## CONCLUSION

The Petitioner's writ should be denied not only because he did not properly preserve the issue presented for appeal, but also because regardless whether the position he advocates is applied, the final judgment dismissing his substantive due process claim would be affirmed. The decision to deny his request for a conditional use permit was not arbitrary and capricious. *Henry*, 148 F. Supp. 2d at 714 ("even if Henry could establish a protectable property interest . . . he [could not] establish that the defendants['] actions were so far beyond the outer limits of legitimate state action that no [process] could cure the defendants' actions.") Moreover, the lower courts correctly applied the *Roth* entitlement standard in these circumstances, and they reached the correct conclusion in finding that Petitioner had no property interest in the permit he sought.

For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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